Supreme Court, U.S.
FILED
APR 15 1993

No. 92-1331

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM POLLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
SCOTT A. SCHUMACHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals properly determined that distinct acts of tax evasion may constitute separate offenses under 26 U.S.C. 7201.

2. Whether the district court impermissibly sentenced petitioner to consecutive sentences.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Blackledge v. *Perry*, 417 U.S. 21 (1974)	7
Chapman v. *United States*, 111 S. Ct. 1919 (1991)	9
Cohen v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962)	10
Jones v. *Thomas*, 491 U.S. 376 (1989)	13
Menna v. *New York*, 423 U.S. 61 (1975)	7
Sanabria v. *United States*, 437 U.S. 54 (1978)	7
Spies v. *United States*, 317 U.S. 492 (1943)	8
United States v. *Broce*, 488 U.S 563 (1989)	7
United States v. *Ewings*, 936 F.2d 903 (7th Cir. 1991)	13
United States v. *Garcia*, 903 F.2d 1022 (5th Cir.), cert. denied, 498 U.S. 948 (1990)	13
United States v. *Lennon*, 246 F.2d 24 (2d Cir.), cert. denied, 355 U.S. 836 (1957)	9
United States v. *Lincoln*, 925 F.2d 255 (8th Cir.), cert. denied, 111 S. Ct. 2838 (1991)	13
United States v. *Minker*, 312 F.2d 632 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963)	10
United States v. *Niven*, 952 F.2d 289 (9th Cir. 1991)	11, 12, 13
United States v. *Parks*, 924 F.2d 68 (5th Cir. 1991)	11, 13
United States v. *Scarano*, 975 F.2d 580 (9th Cir. 1992)	12, 13
United States v. *Smith*, 335 F.2d 898 (7th Cir. 1964), cert. denied, 379 U.S. 989 (1965)	9-10
United States v. *Watford*, 894 F.2d 665 (4th Cir. 1990)	11, 13

Constitution, statute and rules: Page

U.S. Const. Amend. V (Double Jeopardy Clause) 5, 12
26 U.S.C. 7201 ..... 2, 5, 7, 8, 9, 10, 12, 13
Sentencing Guidelines:
§ 1B1.3(a)(2) 11
§ 2T1.1 11
§ 2T1.1(a) 11
§ 3D1.2 10-11
§ 3D1.2(d) 11

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1331

WILLIAM POLLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-30a) is reported at 978 F.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1992. A petition for rehearing was denied on November 10, 1992. The petition for a writ of certiorari was filed on February 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of New Jersey, petitioner was convicted on four counts of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201. The four counts charged petitioner with willfully attempting to evade payment of income taxes for the taxable years 1967, 1970, 1972-1975, and 1982. Pet. App. 5a.

1. Petitioner's guilty plea in this case was "not the first chapter in the saga of [petitioner's] attempts to evade his obligation to pay personal income taxes to the United States government." Pet. App. 3a. Petitioner, a medical doctor, was indicted in April 1972 on three counts of income tax evasion for the years 1965, 1966, and 1967. The charges stemmed from an Internal Revenue Service investigation revealing that between 1965 and 1967 petitioner deposited $650,000 in a New Jersey bank without reporting to the IRS any income relating to the deposits. *Ibid.*

Before petitioner was arraigned on those charges, he fled. After a bench warrant was issued for his arrest, he was apprehended in Canada. In March 1973, he pleaded guilty to evading $146,987 in taxes due for 1967. He then failed to appear for sentencing, and another bench warrant was issued for his arrest. Petitioner evaded custody until May 7, 1974. After his apprehension, petitioner was sentenced to a five-year term of imprisonment. Pet. App. 3a.

Meanwhile, in response to a petition filed by the IRS, the district court appointed a receiver for petitioner's estate, with instructions to take custody of all property belonging to petitioner and his wife and to satisfy petitioner's tax liens for calendar years 1965-1967. The receiver remained in place from 1972 through 1978. Throughout that period, petitioner continued to conceal substantial assets located outside the United States, and

he refused to cooperate with the receiver's efforts. As a result, the district court held petitioner in civil contempt from January 1974 through June 1975. Pet. App. 4a.

During his tenure, the receiver collected approximately $1,300,000. About half of that amount was remitted to the IRS to pay petitioner's tax obligations for 1965 and 1966, and a portion of his taxes due for 1967. Pet. App. 4a.

After petitioner was released from prison in April 1976, he continued to evade payment of his taxes and to conceal assets from the government. Consequently, a grand jury returned a four-count indictment, charging petitioner with willfully attempting to evade and defeat the payment of income taxes for the years 1965 through 1967, 1972 through 1975, and 1980 through 1982, in an amount in excess of $640,000. Petitioner fled again, and he remained a fugitive for more than four years. Pet. App. 5a.

Petitioner was apprehended on August 15, 1990. When he was arrested, petitioner possessed numerous pieces of false identification, including social security cards, passports, driver's licenses, and credit cards. He also had a portable computer that contained information, recorded in at least four different coding systems, detailing his elaborate international system for concealing assets from the IRS. Pet. App. 5a.

2. A superseding eight-count indictment was later returned against petitioner. Pet. App. 5a. The four counts to which petitioner pleaded guilty (Counts 1-3 and 5) charged different attempts to evade the payment of income taxes for seven years—1967, 1970, 1972 through 1975, and 1982. *Ibid.* Count 1 charged that on or about April 18, 1984, petitioner willfully attempted to evade payment of taxes by placing part of his assets out of the reach of the United States government. The indictment

alleged that he caused approximately $690,000 in gold to be delivered to the Swiss Bank Corporation in Toronto, Canada, with instructions to transfer the gold to a nominee account at the Swiss Bank Corporation in Zug, Switzerland. Pet. App. 58a-59a.

Count 2 charged that on or about June 12, 1984, petitioner willfully attempted to evade payment of his income taxes by causing approximately $285,000 in gold to be delivered to the Swiss Bank Corporation in Toronto, Canada, with instructions to transfer the gold to a nominee account at the Swiss Bank Corporation in Zug, Switzerland. Pet. App. 60a.

Count 3 charged that between October 5, 1981, and December 18, 1984, petitioner willfully attempted to evade payment of his income taxes by a continuing course of conduct designed to conceal his assets. That conduct included the use of currency, money orders, and cashier's checks in the acquisition of assets and the payment of living expenses, and the use of nominees to conceal the expenditures. Pet. App. 61a.

Count 5 charged that on or about August 22, 1990, petitioner willfully attempted to evade payment of his income taxes by maintaining in a fictitious name more than $350,000 in gold, platinum, jewelry, and gems in safety deposit boxes at a bank in North Carolina. Pet. App. 63a.

The district court held a three-day sentencing hearing. On Count 5, the only count that was subject to the Sentencing Guidelines, the court sentenced petitioner to 60 months' imprisonment. Petitioner was sentenced to three concurrent five-year terms of imprisonment on Counts 1, 2, and 3. The sentence on those counts was made consecutive to the Guidelines sentence on Count 5. Pet. 5.

3. On appeal, petitioner claimed that the four counts to which he pleaded guilty were multiplicitous. Because

he committed what he claimed was a single violation of 26 U.S.C. 7201, petitioner argued that the multiple punishments he received violated the Double Jeopardy Clause. Pet. App. 2a. In addition, petitioner claimed that the district court erred in making the Guidelines sentence imposed on Count 5 consecutive to the non-Guidelines sentence imposed on Counts 1 through 3. Pet. App. 28a. Petitioner also claimed that the district court erred in increasing his Guidelines offense level by four levels to reflect his role in the offense charged in Count 5. Pet. App. 2a.

The court of appeals rejected petitioner's double jeopardy claim. Since the sentences for Counts 1-3 ran concurrently, the court of appeals examined only whether the acts of evasion charged in those three counts constituted the same offense as the acts of evasion charged in Count 5. Pet. App. 9a n.10, 12a. Looking to the unit of prosecution under 26 U.S.C. 7201, the court held that the discrete acts of evasion charged in the two sets of counts constituted separate offenses, because Section 7201 "evinces the congressional intent to allow distinct, significant, affirmative acts of tax evasion" to constitute separate violations of Section 7201. Pet. App. 15a-16a, 17a n.15.

The court also concluded that in light of the facts of this case, it was especially appropriate to treat distinct acts of evasion as constituting separate offenses. Petitioner made several separate transfers of hundreds of thousands of dollars for the purpose of evading the taxes he owed for all seven years at issue in the indictment. The court pointed out that at the time petitioner engaged in those transactions, he knew that he owed substantial amounts of tax, but that (as petitioner admitted) he did not know the tax years to which each act of evasion applied. Thus, the court concluded that petitioner attempted through his several

affirmative acts to evade payment of all taxes he owed, regardless of the tax years in question. Pet. App. 16a.

The court also rejected petitioner's contention that in imposing consecutive sentences for his pre-Guidelines and Guidelines offenses, the district court double-counted all of the taxes he owed for the tax years in question and thus abused its discretion. Pet. App. 30a. The court of appeals relied upon the settled principle that a sentencing court has broad discretion in choosing a sentence within statutory limits in pre-Guidelines cases. Pet. App. 29a. The court then held that the fact that a defendant is convicted of an offense subject to the Guidelines does not affect the sentencing court's discretion with respect to offenses that are not subject to the Guidelines. Pet. App. 30a.

Finally, the court held that the district court committed plain error in departing upward from the Guidelines sentencing range based on petitioner's leadership role in the offense. Pet. App. 19a-26a. The court of appeals concluded that the district court had failed to focus on petitioner's role with respect to the specific count at issue, and instead had improperly relied on petitioner's role in the overall scheme. The court therefore vacated petitioner's sentence on Count 5 and remanded to the district court for further sentencing proceedings. Pet. App. 24a-25a, 30a. Petitioner was resentenced on December 17, 1992. An appeal from the new sentence is pending in the court of appeals. Pet. 6 n.5.

ARGUMENT

1. Petitioner contends (Pet. 6-17) that he was improperly subjected to multiple punishments on the four counts to which he pleaded guilty. The court of appeals correctly rejected that claim.[1]

---

[1] As petitioner acknowledges (Pet. 6 n.5), this case is an interlocutory posture. In the court of appeals, petitioner's claims went

a. Petitioner's claim is one of multiplicity—he alleges that he was subjected to multiple charges and multiple punishments for conduct that constituted only a single offense. Because he pleaded guilty to all four counts at issue here, petitioner conceded that he committed four distinct offenses. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989) ("a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede[s] that he has committed two separate crimes"). The four counts at issue in this case facially alleged four distinct acts of evasion; Count 5 thus was not "facially duplicative" of the offenses charged in Counts 1-3. See *Broce*, 488 U.S. at 575 (distinguishing *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975)). Petitioner therefore waived his multiplicity claim when he pleaded guilty to four of the offenses charged in the indictment.

Even if petitioner's guilty plea had not effected a waiver of his multiplicity claim, that claim would be without merit in any event. The resolution of a multiplicity claim depends on the unit of prosecution established by Congress in the statute. *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978). Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" is "guilty of a felony." As the court of appeals found, the plain language of Section 7201 "evinces the congressional intent to allow distinct,

only to the lawfulness of his sentence on Count 5. The court of appeals concluded that the district court relied on an erroneous ground in imposing an upward departure and accordingly remanded the case for resentencing on that count. Pet. App. 26a, 30a. Petitioner was resentenced, and his appeal of that sentence remains pending. The petition in this case raises issues solely relating to the lawfulness of petitioner's sentence on Count 5, a sentence that is not yet finally determined.

significant, affirmative acts of tax evasion to constitute separate section 7201 offenses." Pet. App. 15a-16a.

Petitioner argues (Pet. 9) that the offense defined by Section 7201 is "tax evasion" and that the unit of prosecution therefore necessarily turns on each tax obligation that is evaded. That is incorrect. Although "tax evasion" is the familiar shorthand expression for the offense, Section 7201 specifically penalizes any willful attempt to evade tax. *Spies* v. *United States*, 317 U.S. 492, 498-499 (1943). Multiple acts of evasion therefore constitute multiple violations of Section 7201.

Contrary to petitioner's assertion (Pet. 10-11), repeated acts of evasion add to the harm against which Section 7201 is directed. Each time a taxpayer engages in an act of evasion, he increases the likelihood of his success, increases the amount of tax that may ultimately be evaded—even if he is not completely successful, and increases the potential cost of the IRS's enforcement and collection efforts. Thus, repeated, discrete efforts to evade a tax result in an increased likelihood of delinquency and an increased danger to the integrity of the tax system as a whole. The language and purposes of the statute therefore confirm that Congress could not have intended taxpayers to be free to engage in any number of distinct acts of evasion without fear of any incremental penalty as long as all of the acts relate to taxes due in the same tax year.

Basing separate charges on separate acts of evasion is particularly appropriate in a case such as this one, where the defendant owes unpaid taxes for a number of years and the charged acts of evasion occured in widely separated time periods: the acts charged in Counts 1-3 occurred between 1981 and 1984, while the acts charged in Count 5 occured in 1990. As petitioner acknowledges, his various attempts to evade taxes related not to any specific tax year, but to all the taxes he owed, regardless

of the tax year. The court of appeals was therefore correct in rejecting petitioner's con-tention that, when a defendant's acts result in evasion of tax obligations for many years, discrete acts of evasion cannot constitute the appropriate unit of prosecution under Section 7201.[2]

b. The decision in this case does not conflict with any decision of any other court of appeals. Petitioner has cited no case holding that the particular tax obligation that is the object of the evasion is the only appropriate unit of prosecution under Section 7201, and we have found no such case. Although petitioner cites (Pet. 7-8) cases recognizing that a series of acts designed to evade the tax for a particular period can properly be charged as a single violation of Section 7201, those cases do not hold or even suggest that separate and distinct acts constituting attempts to evade taxes for the same period do not also constitute separate offenses under Section 7201. The issue in this case, which the court of appeals referred to as a "unique question," Pet. App. 12a, was not addressed or decided in any of the cases relied upon by petitioner. See *United States* v. *Lennon*, 246 F.2d 24, 27 (2d Cir.), cert. denied, 355 U.S. 836 (1957);[3] *United States* v. *Smith*, 335 F.2d 898, 900-901 (7th Cir.

---

[2] Petitioner complains (Pet. 16) that the court of appeals failed to follow the rule of lenity. As the court concluded (Pet. App. 17a n.15), however, "section 7201 is not ambiguous," and there was therefore "no need to resort to the rule of lenity." See *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991).

[3] In *Lennon*, the court rejected the contention "that it was prejudicial error for the trial court to submit to the jury, as single counts for each year in question, the combined issues of understatement of income and of fraudulent exemptions." 246 F.2d at 27. The court of appeals held that filing a false return constituted only one act of evasion, regardless of the number of false statements on the return. *Ibid.* That holding does not speak to the question in this case.

1964), cert. denied, 379 U.S. 989 (1965);[4] *United States* v. *Minker*, 312 F.2d 632 (3d Cir. 1962), cert. denied, 372 U.S. 953 (1963).[5]

The decision of the Ninth Circuit in *Cohen* v. *United States*, 297 F.2d 760, cert. denied, 369 U.S. 865 (1962), indicates that the unit of prosecution under Section 7201 need not be limited to the particular tax that the defendant attempts to evade. In that case, the court held that the defendant's conviction for evasion of the payment of taxes did not violate double jeopardy when the defendant had previously been convicted for evasion of assessment of those same taxes. 297 F.2d at 769-771.

c. Finally, the issue in this case has limited practical significance. Under the Sentencing Guidelines, a defendant's sentence will generally be the same regardless of the unit of prosecution under Section 7201. Sentencing

[4] In *Smith*, the Seventh Circuit observed that three tax evasion counts "might be said to pertain to 'a continuing course of illegal conduct,' in the sense that the intention was to avoid taxes so long as payoffs" made to the defendant, a union official, continued, but the court concluded that each count stated a separate offense. 335 F.2d at 900-901. The court stated that "in a criminal tax evasion case each year stands alone, and the failure to pay taxes in each of the years involved constitutes a separate offense." *Id.* at 901. There is nothing inconsistent between that statement and the holding in this case that separate acts of evasion may constitute separate offenses.

[5] In *Minker*, the defendant was convicted of willfully attempting to evade wagering excise taxes. The Third Circuit held that the defendant could be sentenced on separate counts for each month of attempted evasion because each month of attempted evasion constituted a separate offense. The court reasoned that the month was "the unit of time which is the basis for the tax, just as a year is the period for which income taxes are due." 312 F.2d at 636. That statement, while true as far as it goes, does not speak to the question whether multiple, discrete acts of evasion with respect to a tax obligation for a single tax year constitute separate violations of Section 7201.

Guidelines § 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together" when a defendant is charged with multiple counts. Under Sentencing Guidelines § 3D1.2(d), multiple counts of attempted evasion are grouped. See also Sentencing Guidelines § 2T1.1 (Tax Evasion). Once related tax counts have been grouped, the Guidelines sentence is based on the total tax loss, not on the number of separate violations. Thus, for offenses occurring after November 1, 1987, the effective date of the Sentencing Guidelines, the resolution of the unit of prosecution issue in this case will not have any impact on the length of a defendant's sentence.

2. Petitioner contends (Pet. 18-21) that it was improper for the district court to impose consecutive sentences on the pre-Guidelines and Guidelines counts, because "the Guidelines sentence [was] calculated based on the conduct which formed the basis for the pre-Guidelines counts." Pet. 18.

Under the Sentencing Guidelines, petitioner's sentence on Count 5 was based in part on the "tax loss" caused by his crime, which was "the total amount of tax that the taxpayer evaded or attempted to evade." Sentencing Guidelines § 2T1.1(a). As petitioner points out (Pet. 18), the Guidelines require a sentencing court to consider the loss from all acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. Sentencing Guidelines §§ 1B1.3(a)(2), 2T1.1 Application Note 3. Pursuant to Section 1B1.3(a)(2), pre-Guidelines conduct can properly be considered in sentencing a defendant on a Guidelines count. *E.g.*, *United States* v. *Parks*, 924 F.2d 68, 71 (5th Cir. 1991); *United States* v. *Niven*, 952 F.2d 289, 294 (9th Cir. 1991); *United States* v. *Watford*, 894 F.2d 665, 668 n.2 (4th Cir. 1990).

The district court determined, for purposes of calculating petitioner's sentence on Count 5, that the tax loss caused by petitioner's conduct was approximately $488,000. Pet. App. 38a. Petitioner asserts that, because that tax loss resulted in part from conduct that predated the conduct charged in Count 5, the sentence the court imposed on Counts 1-3 must have been based in part on the same tax loss calculation. Relying on two Ninth Circuit cases, *United States* v. *Niven*, 952 F.2d 289 (1991), and *United States* v. *Scarano*, 975 F.2d 580 (1992), petitioner argues that it is improper for a court to impose consecutive sentences for Guidelines and non-Guidelines counts if the sentencing court bases both sentences on the same tax loss. In stating the considerations underlying the sentence it imposed, however, the district court in this case did not suggest that it was basing its sentence on Counts 1-3 on the amount of tax loss caused by the conduct charged in those counts or in Count 5. Rather, the court explained that it was imposing a consecutive sentence on Counts 1-3 because of the magnitude of the assets concealed by petitioner and the "disdain and arrogance shown by [petitioner] towards our tax laws over such a considerable period of time dating from before 1965." Pet. App. 43a. Moreover, there is no evidence that the district court sentenced petitioner on Count 5 based on anything other than the amount of taxes that were due and owing at the time he committed the evasive acts charged in that count, as opposed to the amount of taxes he had evaded over the years. Thus, petitioner has failed to demonstrate that the tax loss forming the basis for the sentence on Count 5 was also considered in sentencing him on Counts 1-3, and there is therefore no basis for

concluding that the double counting of which petitioner complains occurred in this case.[6]

In any event, even if the decision below conflicted with *Niven* and *Scarano*, review by this Court would be unwarranted. Petitioner's claim of a conflict relates only to cases in which a defendant is sentenced for one crime under the Guidelines and for another crime under pre-Guidelines law. Such mixed cases have arisen where some, but not all, of the offenses for which a defendant has been convicted occurred before November 1, 1987, the effective date of the Guidelines. The issue thus affects only a closed and rapidly dwindling set of cases, and therefore does not call for this Court's review.

---

[6] Even if the sentencing court had based the non-Guidelines and Guidelines sentences on the same loss figure, we submit that the non-Guidelines sentence could not be challenged on that ground. The Double Jeopardy Clause in the multiple punishment context is concerned only with ensuring that the punishment does not exceed that authorized by the legislature, see *Jones* v. *Thomas*, 491 U.S. 376, 381 (1989). Each count under Section 7201 subjects a defendant to up to five years of imprisonment. An appellate court therefore has no basis for overturning consecutive sentences on pre-Guidelines and Guidelines counts, as long as no sentence on any count of tax evasion exceeds five years and the court has correctly applied the Sentencing Guidelines. *United States* v. *Watford*, 894 F.2d at 669; *United States* v. *Parks*, 924 F.2d at 73; *United States* v. *Garcia*, 903 F.2d 1022, 1024-1026 (5th Cir.), cert. denied, 498 U.S. 948 (1990); *United States* v. *Ewings*, 936 F.2d 903, 910 (7th Cir. 1991); *United States* v. *Lincoln*, 925 F.2d 255, 256-257 (8th Cir.), cert. denied, 111 S. Ct. 2838 (1991). In this case, the court of appeals correctly held that the non-Guidelines sentences were within the statutory limit, and it remanded the Guidelines sentence for recalculation based on the one error the court found in the district court's application of the Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
SCOTT A. SCHUMACHER
Attorneys

APRIL 1993